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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 496

222 EAST CHESTNUT STREET CORPORATION, a corporation of Delaware, and MARYLAND CASUALTY COMPANY, a corporation of Maryland,

Petitioners,

v.

AARON B. WEINER, LA SALLE NATIONAL BANK, not personally but as Trustee under Trust Agreement dated December 28, 1954, and known as Trust No. 17365, LEO S. HIRSCHFELD, BOARD OF APPEALS OF THE CITY OF CHICAGO, B. EMMET HARTNETT, C. LOGAN McEWEN, MICHAEL L. IGOE, JR., EARL J. McMAHON and KARL M. VITZTHUM, individually and as members of the Board of Appeals of the City of Chicago; GEORGE L. RAMSEY, individually and as Commissioner of Buildings of the City of Chicago; and City of Chicago, a municipal corporation of Cook County, Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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AARON B. WEINER, LA SALLE NATIONAL BANK, not personally but as Trustee under Trust Agreement dated December 28, 1954, and known as Trust No. 17365, LEO S. HIRSCHFELD, BOARD OF APPEALS OF THE CITY OF CHICAGO, B. EMMET HARTNETT, C. LOGAN McEWEN, MICHAEL L. IGOE, JR., EARL J. McMAHON and KARL M. VITZTHUM, individually and as members of the Board of Appeals of the City of Chicago; GEORGE L. RAMSEY, individually and as Commissioner of Buildings of the City of Chicago; and City of Chicago, a municipal corporation of Cook County, Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

222 East Chestnut Street Corporation, a corporation of Delaware, and Maryland Casualty Company, a corporation of Maryland, petitioners herein and defendants below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Seventh Circuit entered in the above cause on May 29, 1962.

OPINIONS BELOW.

No opinion in the United States District Court for the Northern District of Illinois, Eastern Division, was reported. The opinion of the United States Court of Appeals for the Seventh Circuit, rendered on May 29, 1962, is not yet reported but is printed in an appendix hereto.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 29, 1962 and is printed in an appendix hereto. A petition for rehearing of this cause was denied on July 18, 1962. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether in a diversity of citizenship case, where the local law to be followed is that of Illinois, the District Court may decide an issue of law concerning the measure of damages contrary to the established rules of law in Illinois?

2. Whether the Court of Appeals, on review, could sanction the decision of the District Court by itself refusing to follow the law of Illinois?

STATUTE INVOLVED.

The statute involved is the following:

62 Stat. 944, 28 U.S.C. § 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE.

This action was instituted to recover damages under the terms of a supersedeas bond executed by 222 East Chestnut Street Corporation as principal and Maryland Casualty Company as surety in an amount of $60,000. The obligees on the bond included Aaron B. Weiner, LaSalle National Bank, as Trustee under Trust No. 17365, and numerous municipal officials. Jurisdiction in the United States District Court for the Northern District of Illinois was based on diversity of citizenship. 72 Stat. 415, 28 U.S.C. § 1332.

The suit in which the supersedeas bond was executed grew out of an application for a zoning variation filed with the Zoning Board of Appeals of the City of Chicago on December 6, 1955, by plaintiff-respondent LaSalle National Bank. LaSalle was the record owner of the property located at 247-253 East Delaware Place, Chicago, Illinois. Aaron B. Weiner is, for all practical purposes, the beneficial and actual owner of the property. The variation was granted by the Zoning Board of Appeals. 222 East Chestnut Street Corporation, owner of nearby property (herein "222") sued in the Superior Court of Cook County, Illinois, to reverse that action. After the Superior Court affirmed the Zoning Board of Appeals, 222 perfected its appeal to the Illinois Supreme Court. On September 5, 1956, a supersedeas order was entered in the Illinois Supreme Court, conditioned upon 222's furnishing a bond in the penal sum of $60,000, with a licensed surety. On September 6, 1956, 222 presented such a bond, with Maryland Casualty Company as surety. This bond, approved by a Justice of the Illinois Supreme Court, provided in part:

> "If said 222 . . . shall duly prosecute said appeal with effect, and moreover shall pay the amount of any and all costs, and interests in case the judgment is af-

> firmed, and shall also pay any and all damages suffered by LaSalle National Bank . . . and Aaron B. Weiner, by reason of any delay arising from the granting of said supersedeas and stay, in case the judgment is affirmed, then the above obligation to be void, otherwise to remain in full force and effect." (Record 96, Appellants' Appendix 34)

The supersedeas remained in effect until December 19, 1956, a total of three and one-half months.

The plaintiff Weiner claimed to have begun certain construction activities for an apartment building on the premises in question in late August, 1956. These halted when the supersedeas was granted. After the supersedeas was lifted in December, 1956, excavation activities were resumed momentarily, but then were suspended until February, 1957, when the plans and specifications for the construction of the building were reduced to final form.

In financing his project, Weiner had in August, 1956, obtained a commitment from the Prudential Insurance Company of America for a mortgage loan at an interest rate of 4¾%. Disbursement of the loan proceeds was not to be made until completion of the building, provided the completion was by August 28, 1958. However, by an amended commitment obtained January 23, 1957, the date of completion was extended, and the interest rate was raised to 5%. Since the Prudential loan was not to be disbursed until the building was completed, plaintiff Weiner had also to secure interim construction loans. The arrangements for such interim financing was not even orally completed until February, 1957 and not formally completed until July, 1957.

The plaintiffs-respondents contended that the delay during the period of supersedeas caused damage due to increased financing and increased construction costs.

The District Court entered judgment for the plaintiffs-respondents in the amount of $72,617.66, which represented an award of damages equal to the full monetary limit of the bond ($60,000) plus interest on that amount at 5% per annum from January 23, 1957. Additionally, the District Court assessed attorneys' fees in the amount of $500 as costs against Maryland.

On appeal, the Court of Appeals found it necessary to consider only two of the items of damage: (1) an amount of $45,480.70 found to represent an increase in financing costs based upon a rise in the interest rates on the construction and mortgage loans, not for the period of the supersedeas, but projected over the entire future term of the mortgage despite provision for prepayment and the wholly contingent nature of such future interest, and (2) an amount of $26,120 found to represent increased costs on one of the construction contracts due to increase in wages and material costs. The judgment order of the District Court was affirmed in all respects except for the reversal of the allowance of (1) prejudgment interest on the $60,000 face amount of the bond and (2) an assessment of $500 in attorneys' fees as costs.

The Court of Appeals affirmed despite petitioners' contention that the trial court's tenth conclusion of law was contrary to the law of Illinois. The tenth conclusion of law provided:

> "The rule that damages to be recoverable in an action for breach of contract, must have been within the reasonable contemplation of the parties at the time the contract was entered into is not applicable to an action on a bond of the type here involved. Moreover, the language of the bond ('any and all damages') precludes the conclusion that such rule, even if applicable here, would bar the recovery

by plaintiffs of any of the damages proved to have been suffered by them." (Record 634, Appellants' Appendix 1281)

This conclusion led to the improper assessment of damages for (1) the increase in the interest rates charged on both the construction loans and on the mortgage; and (2) the future amount of such increased interest extended over the twenty years of the mortgage term.

REASONS FOR GRANTING THE WRIT.

The Holding of the Court of Appeals That The Authorities Relied Upon By Petitioner To Establish The Illinois Law Were Not Persuasive Is In Direct Conflict With The Decision of This Court In Erie R.R. v. Tompkins and with 28 U.S.C. § 1652.

In determining the issues of this case, the District Court and the Court of Appeals were duty bound to apply local law, *i.e.*, Illinois law, in compliance with the doctrine of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) and the mandate of 28 U.S.C. § 1652. In its tenth conclusion of law the trial court decided a crucial issue directly contrary to the established rule of law in Illinois. On appeal, the Court of Appeals sanctioned this decision in conflict with applicable state law, and disposed of the Illinois decisions thusly:

> "We find none of the authorities relied upon by appellants to establish that the increased financing costs here incurred are too remote or speculative to constitute proper elements of damage to be persuasive." (App. 7a)

This decision by the Court of Appeals is a patent violation of the *Erie* doctrine and Section 1652 of Title 28 of the United States Code.

I.

UNDER ILLINOIS LAW AN INCREASE IN THE RATE OF INTEREST ON A COLLATERAL OBLIGATION IS NOT A PROPER ELEMENT OF DAMAGES IN A SUIT BROUGHT ON A SUPERSEDEAS BOND.

A. Illinois Law Refuses To Allow Increased Interest On A Collateral Agreement As An Item Of Damage For A Breach Of A Contractual Obligation.

McGinnis v. *McGinnis*, 225 Ill. App. 340 (1922) establishes the law of Illinois. In that case, an appeal bond (similar to a supersedeas bond) covering "all costs and damages" had been executed in a case involving title to real estate. During the pendency of the appeal, the obligee of the bond was unable to convey good title and was forced to deposit a sum of money with the title company to provide a purchaser with a title policy. The trial court awarded, as damages to the plaintiffs, interest on the money which had been deposited in that escrow. On appeal, this ruling was held erroneous, the Appellate Court of Illinois saying (225 Ill. App. 345):

> "*The escrow was a mere incident and not a natural consequence of the suit or appeal:* The provision for the payment of all damages resulting from the appeal includes only such damages as are the natural and proximate result thereof.
>
> * * *
>
> "*It not appearing from the language of the bond that interest on the money in escrow was within the contemplation of the parties at the time the bond was executed*, and the loss of the use of the money in escrow not being a proximate result of the suit or appeal, appellant's liability thereon must be held limited to the costs incurred by appellees . . ." (All emphasis herein is supplied, unless otherwise noted.)

The principle of *McGinnis* v. *McGinnis*, 225 Ill. App. 340 (1922) was followed in *Flug* v. *Craft Manufacturing Co.*, 3 Ill. App. 2d 56, 120 N.E. 2d 666 (1954).

The rule of law enunciated by *McGinnis* v. *McGinnis* (*supra*) is but a restatement of the law of Illinois followed without question in prior years. In *Snell* v. *Cottingham*, 72 Ill. 161 (1874), the Supreme Court of Illinois similarly denied the right to damages allegedly incurred under a collateral agreement. The Court said (72 Ill. 169-170):

> "We do not understand upon what principle the rule of damages contended for can be maintained. How can it be said, the damages resulting from the non-performance of a contract between parties can be measured by a mere private agreement between others, to which they are strangers? It is, no doubt, true, if the road had been completed by the 1st day of January, 1872, appellants would have obtained a rebate of the interest on the total amount of the construction bonds; but if it was intended to hold appellees responsible in case of non-performance of their contract, according to the terms of their private agreement with the lessee of the road, they should have made it a part of the contract the damages should be so measured. Although appellees may have known there was such agreement between appellants and the lessee, they will not be presumed to have contracted with reference to any such mode of ascertaining the damages, and in the absence of any special contract they are bound by no such rule."

Thus, under Illinois law the party charged with liability for damages under a contract must not only have known of the collateral agreement for which damages are claimed at the time of his entry into the agreement, but he must also have manifested in some way his assent to be liable for damages in the event of a breach.

B. The Court of Appeals (1) Disregarded Illinois Law in Allowing Damages Based Upon An Increase In Interest Costs Based On A Collateral Agreement And (2) By Approving The Trial Court's Tenth Conclusion Of Law, Established The Wholly Untenable Rule of Law That The Reasonable Contemplation Of The Parties Does Not Govern Their Contractual Relations. The Approved Conclusion Of Law Goes Even Further, And Establishes a Rule That Any Damages of Any Kind, Even Though Not in The Contemplation of the Parties At the Time Of Their Contract, Is Nevertheless Recoverable Under The Supersedeas Bond in Question.

1. The tenth conclusion of law,* the touchstone of the decision below, is doubly bad.

a. First, the conclusion is contrary to Illinois law, in fact to all law, in holding that *damages may be recovered under a supersedeas bond even though not within the reasonable contemplation of the parties at the time the contract was executed.* To state this is to emphasize how far the Court of Appeals departed from the accepted and usual course of judicial proceedings.

Inherent in every contract is the doctrine of a meeting of the minds. Here there is sanctioned a rule of damages that negatives such a doctrine, and opens the door to any source of damage whatsoever.

b. Secondly, the tenth conclusion of law establishes the doctrine that the language "any and all damages" means damages which were not within the reasonable

* "The rule that damages, to be recoverable in an action for breach of contract, must have been within the reasonable contemplation of the parties at the time the contract was entered into is not applicable to an action on a bond of the type here involved. Moreover, the language of the bond ('any and all damages') precludes the conclusion that such rule, even if applicable here, would bar the recovery by plaintiffs of any of the damages proved to have been suffered by them." (Record 634, Pet. App. 1281)

contemplation of the parties at the time the contract was executed, and may be used to justify recovery of damages which were not contemplated or part of the contractual agreement.

Both aspects of the tenth conclusion of law are contrary to accepted and usual rules of law, and are directly contrary to established Illinois law.

2. The damages granted in the instant case for the increased cost of financing were based solely on plaintiff Weiner's contention that, because of tthe existence of the supersedeas, (i) the completion date required under the mortgage loan commitment from Prudential had to be extended in order to obtain the agreement of a bank to furnish interim construction financing, and (ii) in order to obtain the extension of the completion date a higher interest rate had to be paid on the Prudential loan.* The allowance of damages based upon such a claim, not in the contemplation of the parties, is doubly collateral.

(a) The interim construction loan, the securing of which was purportedly the reason the mortgage loan commitment had to be modified, was not even in oral existence at the time the supersedeas bond was executed and (b) the fact that, to obtain an extension of the completion date under the mortgage loan commitment, an increased rate of interest would have to be paid, could not have been in the contemplation of the parties, being itself part of a collateral agreement not made part of the supersedeas bond.

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* Of the damages, the Court of Appeals said:

"Under the circumstances here presented the increase due to the rise in interest rates was an item of damages attributable to the stay and properly recoverable under the terms of the bond. It is a matter of common knowledge that construction projects of the type here involved ordinarily require financing and that interim construction financing is utilized to secure construction funds which are repaid from proceeds of a mortgage loan on the completed structure." (App. 6a)

The allowance of damages for the increased interest rate, even if limited to those actually paid by Weiner to time of trial, is contrary to Illinois law. Simply stated, if Weiner had been financing the building himself, or had been able to negotiate a lower interest rate because of the supersedeas delay, damages would not have accrued. The Illinois law, disregarded by the Court of Appeals, properly denies recovery of damages based upon collateral agreements.

As *McGinnis* v. *McGinnis* (*supra*) makes clear, the law of Illinois does *not* approve the allowance of damages based upon an interest rate in a wholly collateral agreement. It is "common knowledge" that owners of property sell it; "common knowledge" that to sell property involved in litigation requires a title guaranty policy and "common knowledge" that obtaining such a title policy for property in litigation requires the deposit of funds in escrow, which funds may have to be borrowed at a cost in interest. The law of Illinois, however, does *not* allow as damages the cost of such interest. The Court of Appeals disregarded this law in allowing as damages the *increased* cost of interest in the wholly collateral agreements between Weiner and his sources of financing.

II.

UNDER ILLINOIS LAW THE DAMAGES FOR AN INCREASE IN INTEREST RATE, EVEN IF PROPERLY RECOVERABLE, MAY NOT BE RECOVERED UNTIL ACTUALLY ACCRUED OR PAID.

A. Contingent Future Payments Are Not Recoverable Damages Under The Illinois Law.

The controlling Illinois law on this point is the rule laid down in *Mount Hope Cemetery Ass'n* v. *Weidenmann*, 139

Ill. 67, 28 N.E. 834 (1891). The plaintiff in that case was a former employee of the defendant. The term of the employment contract was five years but the defendant discharged the plaintiff prior to the expiration of the term. The plaintiff sued for breach of contract and was awarded damages measured by wages due to date of trial and the present discounted value of wages that would have been earned *subsequent* to the trial. On appeal, the award of damages for wages not yet earned by the date of trial was held erroneous. The court said (at 79):

> "In view of the fact that the servant may die or become incapable of performing before the expiration of the term of his employment, and the uncertainty of the wages or emoluments he may be enabled to earn in the future, we are disposed to follow the rule that the plaintiff shall be limited to his actual loss *at the time of trial.* It must necessarily be that the actual loss of the plaintiff between the trial and the expiration of the term can not be definitely determined, and any amount allowed must, from the very nature of things, be largely speculative. *By the adoption of the rule limiting recovery to the day of trial all difficulty would be avoided in the assessment of his damages.* There is no hardship in this, for, as we have seen, if he desires so to do he may lie by until the expiration of the term."

This case governs the instant future mortgage payments, since there is no reasonable certainty they will be made, and the effect of future changes in interest rates is wholly speculative.

In *Corby* v. *Seventy-One Hundred Jeffery Ave. Bldg. Corp.*, 325 Ill. App. 442, 60 N.E. 2d 236 (1945), the plaintiff had been employed to manage property owned by the defendant building corporation which was engaged in a bankruptcy reorganization. The defendant discharged plaintiff. Although the appellate court held that the dis-

charge was wrongful, it limited damages to the date of trial. This limitation grew out of the conditions contained in the management contract: (1) the defendant could terminate the contract if it acquired all its preferred stock during the term; (2) the defendant could make a bona fide sale of the property; (3) the contract was to terminate if the defendant was dissolved or liquidated; and (4) the defendant could terminate if plaintiff failed to perform faithfully, diligently and efficiently. The plaintiff also had the right to terminate the agreement on thirty days' written notice. In disallowing damage beyond the date of trial, the Court said (at 457):

> "We feel, under the facts and circumstances in this case, that the actual loss of plaintiff between the date of trial and the date of the expiration of the contract could not be definitely determined and from the very nature of things any amount allowed would be largely speculative.
>
> "We adopt the rule as laid down in the case of *Mount Hope Cemetery Ass'n.* v. *Weidenmann,* 139 Ill. 67, limiting damages to the date of trial. The plaintiff has a right, if he so desires in the future to institute proceedings from time to time during the term of the contract for damages which he may have sustained, or he may wait until the expiration of the contract and recover for such damages, if any, as he may have sustained from December 31, 1942, to the date of the expiration of the contract."

This case shows that the Illinois courts are committed to the rule that *damages are recoverable only to the date of the trial.* As recently as 1959, the United States District Court for the Southern District of Illinois recognized the *Mount Hope* and *Corby* cases as setting forth the definitive Illinois law on damages. *Gass* v. *National Container Corporation,* 171 F. Supp. 441, 446 (S.D. Ill. 1959).

These cases are particularly applicable to a suit on a penal bond, such as a supersedeas bond which is the basis of this litigation. Under the law of Illinois, contrary to the law approved by the Court of Appeals, each additional element of damage constitutes a new breach. In a suit on a penal bond, the plaintiff is only entitled to an award of damages equal to those actually suffered to the date of the trial. Ill. Rev. Stat. ch. 110, § 53 (1961); *Dent* v. *Davison*, 52 Ill. 109 (1869); *McDole* v. *McDole*, 106 Ill. 452 (1883).

B. The Court of Appeals Overlooked and in Fact Directly Negatived the Clear Illinois Law That Disallows Recovery of Damages Which Will Only Accrue in the Future.

The Court of Appeals said:

> "Appellants' contention that the award in so far as it reflects damages for the additional interest on future installments is an award of contingent damages which may never accrue to plaintiffs because of lack of personal liability on the note overlooks the fact of Weiner's sole beneficial interest in the site and the equity money he has invested in the project." (App. 7a)

Weiner's equity interest does not in any way affect the contingency introduced by the prepayment provision. By prepaying one-fifth of the mortgage balance in each of five years, Weiner can limit his increased payments to a five-year period *without incurring any cost under the mortgage.*

Weiner's equity interest does not remove the contingency introduced by the trustee's note. It is quite conceivable that his equity could be completely wiped out within the next 20-year period by an extraneously caused drop in fair market values of apartment buildings. Such events have

happened in the past and only an extreme optimist would predict that the same thing could not happen again. Indeed, such a contingency is the very reason why Prudential would lend no more than $1,800,000 on a $2,600,000 project. No responsible lending agency makes loans of 100 per cent of the fair market value of property.

The very award of damages to plaintiff Weiner in this case, if used to prepay the mortgage, will at once reduce the interest cost and result in an automatic windfall derived from discounting the future increased interest payments at a lower rate (4%) than is provided in the note and mortgage (5%).

The Illinois law clearly denies recovery for such speculative and unaccrued future damages, but the Court of Appeals refused to follow this law. In the instant case, the damages allowed by the Court of Appeals in effect represent the present value of an increase in the monthly interest payments not yet made at the time of trial, allegedly resulting from an increase in the interest rate on the Prudential loan. This accumulation of increased payments was discounted at a rate of 4% and clearly constitutes an award of contingent damages which may never be suffered by the plaintiffs.

III.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED SO THAT THE COURT OF APPEALS MAY BE DIRECTED TO ASCERTAIN AND FOLLOW THE LAW OF THE STATE OF ILLINOIS, CONTROLLING IN THIS DIVERSITY CASE. A COURT OF APPEALS SHOULD NOT BE PERMITTED TO IGNORE STATE LAW.

It is significant that, in approving the allowance of damages based upon an increased interest rate in a collateral

agreement, and projecting that unaccrued interest rate twenty years in the future, the Court of Appeals cited not a single case or statute, neither to follow, distinguish or overrule (App. 6a-7a)

The controlling authorities cited above were ignored entirely by the District Court in its tenth conclusion of law. In the Court of Appeals these authorities were brushed aside as not being "persuasive". (App. 7a) Such course by the District Court and by the Court of Appeals directly repudiates the decisions of this Court and the statutory enactments under which the United States Courts are established.

Federal courts have the duty to apply the applicable state law. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938); 28 U.S.C. § 1654.

If the state law was unclear, then the Court of Appeals was obligated to ascertain and enunciate the applicable law of the State of Illinois. *Sutton* v. *Lieb*, 342 U.S. 402 (1952); *Huddleston* v. *Dwyer*, 322 U.S. 232 (1944); *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943). In determining the law of Illinois, the Court of Appeals was duty bound to follow the decisions of the intermediate state courts, *i.e.*, Illinois Appellate Courts, in absence of convincing evidence that the Illinois Supreme Court would hold otherwise. *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223 (1940); *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940); *Six Companies* v. *Highway Dist.*, 311 U.S. 180 (1940); *Stoner* v. *New York Life Insurance Co.*, 311 U.S. 464 (1940); *Liberty Mutual Ins. Co.* v. *Hartford Accident & Indemnity Co.*, 251 F. 2d 761 (7th Cir. 1958); *Seymour* v. *Union News Co.*, 217 F.2d 168 (7th Cir. 1954); *Ballard* v. *Citizens Cas. Co.*, 196 F.2d 96 (7th Cir. 1952); *Turner* v. *Alton Banking & Trust Co.*, 181 F.2d 899 (8th

Cir.), *cert. denied*, 340 U.S. 833 (1950)); *Prudential Ins. Co. of America* v. *Moore*, 145 F. 2d 580 (7th Cir. 1944), *cert. denied*, 324 U.S. 849 (1945); *Golaris* v. *Jewel Tea Co.*, 22 F.R.D. 16 (N.D. Ill. 1958); *Edlin* v. *Security Ins. Co.*, 160 F. Supp. 487 (S.D. Ill. 1957) rev'd in part on other grounds, 269 F.2d 159 (7th Cir. 1959), *cert. denied*, 361 U.S. 931, 932 (1960). Clearly, the District Court and the Court of Appeals failed to execute their responsibilities in this case.

CONCLUSION.

It is suggested that this case is not one in which the unsuccessful appellant seeks a review by the Supreme Court of the United States because of dissatisfaction with a Court of Appeals opinion. The case presents a clear instance of an adoption by the United States Court of Appeals of a rule of law contrary to the law of the state in which the diversity cause arose. The rule of law enunciated by the Court of Appeals, sweeping aside prior Illinois authority, will inevitably lead to a series of damage claims totally contingent in nature and involving litigants in liability completely beyond their intent. For the reasons stated, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION BELOW.

Opinion of United States Court of Appeals filed May 29, 1962.

Before DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* This action was instituted in the District Court to recover damages under the terms of a supersedeas bond executed by 222 East Chestnut Street Corporation[1] as principal and Maryland Casualty Company as surety in an amount of $60,000.00. 222 and Maryland are defendants-appellants. The obligees on the bond included Aaron B. Weiner and La Salle National Bank as Trustee under Trust No. 17365, plaintiffs-appellees, and numerous municipal officials. The cause was tried by the court without a jury. The court after making and entering detailed findings of fact and conclusions of law entered judgment in favor of Weiner and La Salle National Bank, as trustee,[2] against 222 and Maryland for $72,617.66 and assessed $500.00 attorneys' fees as costs against Maryland.

The suit in which the supersedeas bond was given was a state court action instituted by 222 to reverse the action of the Zoning Board of Appeals of the City of Chicago in granting La Salle National Bank[3] a zoning variation to

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[1] Hereinafter sometimes referred to as 222.

[2] Judgment was entered in favor of defendants-appellants against all plaintiffs other than Weiner and the Bank and no appeal has been taken from that part of the judgment.

[3] The Bank holds title as trustee to the property commonly known as 247-253 East Delaware Place, Chicago, Illinois, and Weiner is the sole beneficiary of the trust.

permit construction of a 23-story brick apartment building with attached 3-story garage without the normally required set-back of approximately eleven feet. The state trial court affirmed the Zoning Board of Appeals and 222 prosecuted an appeal to the Supreme Court of Illinois. On application of 222 it was ordered that a supersedeas issue staying all action by Weiner and the Bank in the erection of the structure pending final disposition of the cause, conditioned on the furnishing of a surety bond in the penal sum of $60,000.00. The bond furnished and approved obligated 222 and the surety to "pay any and all damages suffered by La Salle National Bank . . . and Aaron B. Weiner, by reason of any delay arising from the granting of said supersedeas and stay, in case the judgment is affirmed, . . .". The Supreme Court of Illinois affirmed the judgment (*222 East Chestnut Street Corporation* v. *Board of Appeals*, 10 Ill. 2d 132, 139 N.E. 2d 221) on November 26, 1956 and denied rehearing on January 23, 1957. The supersedeas and stay order was terminated December 19, 1956 on plaintiff-appellees' motion.

The findings of fact and conclusions of law entered by the District Court disclose that the judgment for $72,617.66 represents an award of damages equal to the full monetary limit of the bond ($60,000.00) plus interest on that amount at 5% per annum from January 23, 1957. The findings and conclusions also disclose that the court found and concluded that the plaintiffs sustained various items of damage aggregating $106,383.68 by reason of delay arising from the supersedeas and stay. Included are an amount of $45,480.70[1] found to represent an increase in financing costs—a rise in the interest rates on construction

[1] Increase in financing costs of $1,554.24 on interim construction loan and $43,926.46 on mortgage loan.

and mortgage loans, and an item of $26,120.00 found to represent increased costs on one of the construction contracts involved due to wage and material cost rises. If the District Court did not err in respect to these two major items, which total in excess of the monetary limitation of the bond, it is unnecessary that we consider the other items included in the $106,383.68 aggregate. In view of this we elect to first consider and dispose of the contested issues relating to these two major items.

Appellants' contentions in this connection are, in substance, that the record does not contain substantial support for the District Court's findings that plaintiff Weiner in August of 1956 intended and planned, and was ready, able and determined to proceed with construction of the apartment building, and that the supersedeas and stay caused construction delay; that the increase in the financing cost was not attributable to the stay and is too remote and speculative to constitute a proper element of damage; and that the evidence is both factually and legally insufficient to support the findings of increased construction costs.

Our review of the record convinces us that the District Court's findings on the issues as to whether construction delay was caused by the supersedeas and stay, and whether the increased financing and construction costs embraced in the two major items under consideration were occasioned thereby, have substantial support in the record in so far as factual considerations are concerned and that the court applied correct legal criteria in reaching the conclusions it did. We do not deem it necessary that we make any detailed recital of the evidence. The following summarization of pertinent factors will serve to illustrate the evidentiary basis for the court's ultimate findings.

The record discloses that wrecking, excavation and concrete pouring operations were commenced on the building site August 27, 1956 and continued until interrupted by the supersedeas and stay order of September 5, 1956. Prior to those operations the plans and specifications for the substructure had been completed, Weiner had orally contracted for the substructure work on a cost plus basis, a building permit for such work had been secured, and arrangements for both interim construction financing and mortgage financing had been made, the latter a commitment from the Prudential Insurance Company of America for a mortgage loan of $1,800,000.00 at an interest rate of 4¾ per cent per annum. The mortgage loan was to be used to repay interim construction loans.

The supersedeas and stay was in effect, and construction restrained, until December 20, 1956. During this interval plaintiffs were prevailed upon to substitute concrete caisson foundation construction for the wood piling foundation originally specified but the circumstances surrounding this change in construction method are not indicative, as urged by appellants, that the previous operations, activities and arrangements were but mere sham and that at no time prior to or during the supersedeas period were the plaintiffs ready, able and determined to proceed with construction to completion.

Construction was resumed December 20, 1956 and continued through December 28, 1956 when it was suspended until February 7, 1957 because of uncertainty concerning the financing commitments. The original commitment for the mortgage loan made in August 1956 required that the building be completed by August 28, 1958 and disbursement of the loan proceeds was not to be made until completion of the building. Shortly after the November 26, 1956 decision of the Illinois Supreme Court Weiner was

advised by the representative of the bank which plaintiffs were relying upon to furnish the financing during the construction period that it was a condition of the banks[5] providing the interim construction financing that the completion date specified in the mortgage loan commitment be extended so as to provide two years, or almost two years, from the recommencement of construction for completion of the building. Early in December 1956 Prudential was approached with reference to the proposed extension of the building completion date. Discussions and negotiation followed and culminated in a conference January 23, 1957 at which the terms of the extension were worked out. Construction was resumed February 7, 1957 and the amended formal mortgage commitment was issued February 14, 1957. Interest rates had advanced over the rates prevailing in August 1956 and it was necessary for plaintiffs to agree to a 5% per annum rate to obtain the extended commitment on the mortgage loan. Likewise, the interest rate on loans for construction had advanced ¼% and it was necessary to pay interest at the increased rate on the monies advanced by the banks for financing during the construction period. There was no written agreement executed covering the interim construction financing until July 26, 1957 and before any payments thereof were made Weiner had by that time advanced $480,000.00 in equity money, the substructure was completed, and the superstructure under way. The oral commitment for the bank construction loans had been made prior to August 1956 and if the loans had been closed during October or November of that year the interest rate would have been ¼% less but the construction delay and consequent need for an extension of the mortgage commit-

[5] Two banks were to participate in the loan but one was handling the matter for the other.

ment intervened before the bank construction loans were actually obtained.

Appellants have advanced arguments based on certain of the testimony concerning the status of superstructure plans and specifications, testimony relating to changes made in the substructure plans and specifications due to adoption of the caisson method of construction, the lack of a request for and taking of bids for the substructure work, the failure to notify the adjoining property owner prior to the construction activities in August 1956, and the failure to give certain notices and obtain certain permits, as bearing on the lack of substantial support for the court's finding that the supersedeas and stay caused construction delay. We have considered these and the other peripheral contentions made by the appellants on this issue and find them without merit.

And, it is evident from the record that the construction delay required an extension in completion date of the original mortgage commitment in order to assure the banks expecting to make the construction advances that their loans would be repaid. Under the circumstances here presented the increase due to the rise in interest rates was an item of damage attributable to the stay and properly recoverable under the terms of the bond. It is a matter of common knowledge that construction projects of the type here involved ordinarily require financing and that interim construction financing is utilized to secure construction funds which are repaid from proceeds of a mortgage loan on the completed structure. In such situations additional expense resulting from a rise in the "cost of money" is as much an element of damage as additional expense caused by a rise in labor or material costs. Where such expenses are incurred as a result of construction

delay occasioned by a supersedeas and stay they are a natural and proximate result of the stay and are "damages suffered . . ." by reason of [a] delay arising from the granting of said supersedeas and stay" within the purview of the bond given by appellants. We find none of the authorities relied upon by appellants to establish that the increased financing costs here incurred are too remote or speculative to constitute proper elements of damage to be persuasive.

In computing the damages arising from the increase in the interest rate on the mortgage loan the additional amount of interest on future installment payments was determined and the total present value of the excess monthly payments attributable thereto discounted at 4%[a] was allowed as damages in addition to the additional interest on the payments theretofore made. That the loan contains certain prepayment privileges and is in the form of a trustee's note, secured only by the value of the property, do not in our opinion preclude the allowance of damages so representing the excess or additional interest on the future installment payments. Appellants' contention that the award in so far as it reflects damages for the additional interest on future installments is an award of contingent damages which may never accrue to plaintiffs because of lack of personal liability on the note overlooks the fact of Weiner's sole beneficial interest in the site and the equity money[b] he has invested in the project.

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[a] The court found 4% to represent the current rate of return on safe investments not requiring outstanding experience and skill in selection and management and which can reasonably be expected on the investment of an amount to provide a monthly annuity payment equal to the additional interest on the future installments.

[b] The total construction cost exclusive of land was approximately $2,600,000.00.

The District Court found that solely by reason of the delay arising from the supersedeas and stay the cost of construction of the superstructure of the building was increased and such additional cost included an item of $26,120.00 representing increased cost for work performed in the construction of the superstructure by Carl E. Erickson Co. Both the contractor and the architect testified concerning the increased costs on the basis of the actual price of the superstructure work and their calculations as to what it would have been performed for under lower wage rates and material prices which would have applied to approximately one-half of the work which would have been performed at the lower rates and prices except for the delay. Appellants offered no evidence on the subject. The $26,120.00 figure represents additional construction costs testified to by the architect as based on increased labor costs and the increased price of concrete alone. The finding of the District Court on this item is supported by the record and the evidence adduced conformed to proper standards of proof. *Clarke Const. Co.* v. *United States*, 7 Cir., 290 F. 192.

Our disposition of the issues concerning the two major items of damage makes it unnecessary to consider the other items making up the $106,383.68 aggregate.

Appellants contend that the District Court erred as a matter of law in allowing pre-judgment interest on the $60,000.00 award in the penal sum of the bond. The interest was allowed in reliance upon that part of Ill. Rev. Stat. 1959, Ch. 74, §2 which provides:

> "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all monies after they become due on any bond, bill, promissory note, or other instrument of writing; . . ."

The court concluded that this provision of the statute required the automatic allowance of interest in the instant case without regard to whether the amount was liquidated. The following cases are relied upon to support that conclusion: *Illinois Surety Co.* v. *John Davis Co.*, 244 U.S. 376, 381, affirming *United States* v. *Illinois Surety Co.*, 7 Cir., 226 F. 653; *National Surety Co.* v. *McCormick*, 7 Cir., 268 F. 185; *Holmes* v. *Standard Oil Co.*, 183 Ill. 70; *Santa Cruz Oil Corp.* v. *Allbright-Nell Co.*, 7 Cir., 115 F. 2d 604; *McGuire-Cummings Mfg. Co.* v. *United Alloy Steel Corp.*, 7 Cir., 292 F. 832; *Morrison* v. *Rayman*, 7 Cir., 261 F. 355; *Heissler* v. *Stose*, 131 Ill. 393 and *Elgin, J. & E. Ry. Co.* v. *Northwestern National Bank*, 165 Ill. App. 35.

The first three cases cited approve the allowance of interest under the statute where an award is made for the full monetary amount of a penal bond but they concerned surety bonds in which the subject matter of the obligation carried its own interest due date. *Illinois Surety Co.* involved a contractor's bond conditioned upon prompt payment of amounts due persons supplying labor or materials on a government construction project. Interest was allowed from commencement of the suit for breach of the bond. *National Surety Co.* was a suit on a depository bond conditioned upon the payment out of monies in accordance with directions of the obligee. Interest was allowed from commencement of the suit. In *Holmes* the bond was conditioned upon the payment of "assessments, liens, judgments and demands . . . that may at any time be levied or come against said premises"—all items which would be "due" before they could "come against the premises" and the non-payment of which constituted the breach. Interest was allowed from the date the obligee paid the assessment which had become a lien.

The remaining cases all involve contracts in which the time for payment was either expressly fixed or determinable with reference to a specified event.[8]

In all of the decisions relied upon by plaintiffs, interest was allowed under the statute for a period which commenced when or after payments under the contract, or payments which constituted the subject matter of the bond's obligation, were due and the requirement of the statute that the monies had "become due on [a] bond . . . or other instrument of writing" was met.

The bond here involved secures the payment of "any and all damages" suffered by reason of delay arising from the supersedeas and stay in the event of affirmance of the case on appeal. The obligation is to pay "damages" —a term here used in the sense of monetary compensation for financial loss but which of itself embodies no inherent connotation of a "due" date. The bond does not by expression provision, implication, or by reference to the subject matter of its obligation, specify when payment

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[8] In **Santa Cruz** the contract provided that one-half of the actual net selling price of the machinery was payable "when and as received by" the seller. In **McGuire-Cummings** the correspondence constituting the contract provided that payment for the steel plates was to be made upon the buyer's receipt of remittance therefor from the Railroad Administration which remittance was to be made upon presentation of evidence that the plates had been received f.o.b. the site of the work. In **Morrison** the claim was predicated upon a written undertaking to pay one-half of money and property recovered and the right to payment was found to have accrued on a specific date prior to the bankruptcy. In **Heissler** the lease fixed the date the rental payments were due as the first day of each month — monthly, in advance. In **Elgin, J. & E. Ry. Co.** the $1,727.43 on which interest was allowed was due under provisions of the contract at the time the contractor directed that payment be made to the bank.

thereunder for the loss, if loss occurs, is to be made[9] nor identify any event from or with reference to which payment is due. Here neither the instrument nor the subject matter of its obligation expresses or implies a definite time when monies are due. The interest value therefore does not apply and the rationale of *Harvey* v. *Hamilton*, 155 Ill. 377, 380, governs. In that case it was pointed out that where the interest statute had no application to damages awarded for breach of a written contract because the demand was not for "money due" under its provisions:

> ". . . [I]t is safe to say that, in Illinois, interest is not allowable on unliquidated demands, in any case, where the amount of damages is not ascertainable by simple computation or by reference to generally recognized standards, such as market prices."

The District Court erred in allowing pre-judgment interest.

The final contention that we need consider is whether the District Court erred in assessing $500.00 attorneys' fees as costs against defendant-appellant, Maryland Casualty Company. Ill. Rev. Stat. 1959, Ch. 73, §767 authorizes such action where the surety company's refusal to pay on demand is "vexatious and without reasonable cause". On the record before us, and in view of the unliquidated nature of the damages and lack of provisions in the bond as to time of payment of loss or damage, we find no basis for a finding that Maryland's refusal was vexatious or

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[9] **Cf. Jay-Bee Realty Corp. v. Agricultural Ins. Co.**, 320 Ill. App. 310 where although the damages were unliquidated, the Illinois interest statute was held applicable to a recovery under an insurance policy which expressly provided that the monetary indemnity was payable within a fixed period from the submission of proof of loss. See also: **Knickerbocker Ins. Co. v. Gould**, 80 Ill. 388, 395 and **Lewis Mach. Co. v. Aztec Lines**, 7 Cir., 172 F. 2d 746, 750.

without reasonable cause. It was error to assess attorneys' fees as costs.

The judgment order of the District Court is affirmed in all respects except insofar as it includes an allowance of pre-judgment interest and contains an assessment of attorneys' fees as costs; it is reversed as to the allowance of interest on the $60,000.00 recovery awarded and reversed as to the assessment of attorneys' fees as costs. The cause is remanded to the District Court with directions to modify the judgment order in conformity herewith.

No allowance of costs in this Court is made to either party.

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED WITH
DIRECTIONS.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Tuesday, May 29, 1962

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge

AARON B. WEINER, et al.,
Plaintiffs-Appellees,

No. 13457 vs.

222 EAST CHESTNUT STREET CORPORATION, etc., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED in all respects except insofar as it includes an allowance of pre-judgment interest and contains an assessment of attorneys' fees as costs; it is REVERSED as to the allowance of interest on the $60,000.00 recovery awarded and REVERSED as to the assessment of attorneys' fees as costs. This cause is REMANDED to the said District Court with directions to modify the judgment order in conformity herewith, in accordance with the opinion of this Court filed this day.

No allowance of costs in this Court is made to either party.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, July 18, 1962

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge

AARON B. WEINER, et al.,
Plaintiffs-Appellees,
No. 13457 vs.
222 EAST CHESTNUT STREET CORPORATION, etc., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause, filed by the appellants herein, be and the same is hereby DENIED.

IT IS FURTHER ORDERED by this Court that the petition for a rehearing of this cause, filed by the appellees herein, be and the same is hereby DENIED.